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No. 73-1220

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In the Supreme Court of the United States

OCTOBER TERM, 1973

FORT SILL APACHE TRIBE OF THE STATE OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 15-48) is reported at 477 F.2d 1360. The opinion of the Indian Claims Commission on the government's motion to dismiss the petitioners' claims and the order dismissing the claims (Pet. App. 49-66) are reported at 26 Ind. Cl. Comm. 281.

JURISDICTION

The judgment of the Court of Claims was entered on May 11, 1973. A timely petition for rehearing was denied on November 14, 1973. The petition for a writ of certiorari was filed on February 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1054, as amended 25 U.S.C. 70s(c).

QUESTION PRESENTED

Whether the internment of all members of a band of Indians for 27 years creates a tribal claim under the "fair and honorable dealings" clause of Section 2 of the Indian Claims Commission Act.

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1050, 25 U.S.C. 70a, is set forth in the petition (Pet. 2).

STATEMENT

This case involves the extent to which an Indian tribe may claim compensation for alleged wrongdoing to the tribe unrelated to property rights,[1] where the victims of the alleged wrongdoing were individual

[1] The same historic tribe, the Chiricahua Apache, was awarded $16,489,096 for its aboriginal lands. See *Fort Sill Apache Tribe, et al.* v. *United States*, 26 Ind. Cl. Comm. 193, 198, affirmed, 480 F.2d 819.

members of the tribe (most of whom are now deceased).

In the Indian Claims Commission, the tribe alleged that it is entitled to damages from the United States in the amount of $7,500,000 under the provisions of the Indian Claims Commission Act, 60 Stat. 1049, as amended, 25 U.S.C. 70, for the unlawful arrest and imprisonment for a period of 27 years (from 1886 to 1913) of all the known members of the Warm Springs and Chiricahua Bands of Apache Indians and the wrongful and tortious removal of these Indians from their homes and from reservations established by the government for them as their permanent homes (Pet. App. B 50).

The petitioners based their claims upon alleged obligations undertaken by the United States by virtue of the Indian Trade and Intercourse Act of June 30, 1834, 4 Stat. 729, made applicable to the Territory of New Mexico by Section 7 of the Act of February 27, 1851, 9 Stat. 574, 587, and by virtue of the Treaty of July 1, 1852, between the United States and the Apache Nation of Indians, 10 Stat. 979, ratified March 23, 1853, and proclaimed March 25, 1853 (Pet. App. B 50). The petitioners asserted that, under the Acts and treaty, the United States undertook to protect the bands in the peaceful occupation of their ancestral lands and that in violating that undertaking the United States incurred liability under the Indian Claims Commission Act (*ibid.*).

The United States filed a motion to dismiss the petition. The Indian Claims Commission (with two

commissioners dissenting) granted the motion and dismissed the petition for lack of jurisdiction under 25 U.S.C. 70a(2) and failure to state a claim upon which relief could be granted under the "fair and honorable dealings" clause, 25 U.S.C. 70a(5).[2]

In its opinion, the Commission held that arrest and imprisonment are personal wrongs committed against individual Indians and not a violation of tribal rights and are thus outside the jurisdiction granted the Commission by Congress (Pet. App. B 54). The Commission also held that no "special relationship" on which liability to the Tribe as such could be based was created either by the Treaty of July 1, 1852, with the Apache Nation or under the Trade and Intercourse Act of June 30, 1834 (Pet. App. B 55).

Upon appeal to the Court of Claims, the petitioners abandoned their claim for damages for false arrest and imprisonment of each member of the tribe and asserted "only a tribal claim for injuries to the

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[2] The principal petitioner in this case, the Fort Sill Apache Tribe, had previously filed a petition in Docket No. 30 before the Indian Claims Commission in which it alleged, in addition to a land claim, a claim based on false arrest and imprisonment of the Warm Spring and Chiricahua Apache Indians. This prior claim, in which the allegations as to imprisonment were factually identical with the claim in this case, was dismissed by the Commission on the ground that the allegations concern the rights and obligations of individual Indians and the Commission has no jurisdiction to hear claims on behalf of individual Indians. *Fort Sill Apaches* v. *United States*, 1 Ind. Cl. Comm. 137. In the present case the Court of Claims found it unnecessary to rule on the government's contention that petitioners' claims were barred by the doctrine of *res judicata* (Pet. App. A 27).

tribe's traditional power and structure resulting from the years of internment" (Pet. App. A 18). The Court of Claims (with three judges dissenting) affirmed the decision of the Commission dismissing the petitioners' claim on the grounds of lack of jurisdiction and failure to state a claim upon which relief could be granted. The court held, as had the Commission, that the Indian Claims Commission Act does not grant the tribe a right to recover for essentially personal injuries such as those claimed here. The court also held that the United States had not undertaken a special duty to protect and foster the traditional power and structure of the tribal organization that would give rise to an action under the "fair and honorable dealings" clause (25 U.S.C. 70a(5)) of the Indian Claims Commission Act.

ARGUMENT

1. The Indian Claims Commission Act confers jurisdiction in broad terms over tribal claims. In addition to claims recognized at "law or equity, including those sounding in tort" (25 U.S.C. 70a(2)), it also provides relief for "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity" (25 U.S.C. 70a(5)). The relief is provided for "claims against the United States on behalf of any Indian tribe, band, or other identifiable group" (25 U.S.C. 70a). But the Court of Claims, in seeking some finiteness in the measure of damages and the liability of the United States, has rejected claims for damage to tribal structure

itself as opposed to destruction of tribal property or other measurable claims. See *Gila River Pima-Maricopa Indian Community* v. *United States*, 427 F. 2d 1194, certiorari denied, 400 U.S. 819.

This is in accord with the purpose of Congress in enacting the Indian Claims Commission Act, as explained in previous court of claims decisions. As the Court of Claims stated in the present case (Pet. App. A 23):

> * * * While the court recognizes that a variety of injustices have been inflicted upon Indians both before and after they were relocated on the reservations, it nonetheless does not appear that Congress in 1946 thought this type of injury would come within the coverage of the Claims Commission Act. It has been noted that the Act "is a synthesis of those '* * * classes of cases * * * which have heretofore received congressional consideration in the form of special jurisdictional acts. * * *.'" *Gila River*, 190 Ct. Cl. at 801, 427 F. 2d at 1200. The court has not been made aware of any of the special jurisdictional acts which were intended to cover tribal injuries of the type presented here. The apparent view of the Congress in 1946 was that these claims would be "for specific deprivations of land or property or rights protected by treaty, statute, or then-existing law. The instances cited in the Congressional history are of that kind." 190 Ct. Cl. at 802, 427 F. 2d at 1200-01. H.R. REP. NO. 1466, 79TH CONG., 1ST SESS. (1945).

The decision below is thus, in our view, properly grounded in the Act's legislative history and purpose

by the court with principal responsibility for the Act's interpretation.

2. Contrary to petitioners' suggestion (Pet. 6), the decision in this case will not control a large number of cases now pending before the Commission. The only other case which involves internment of an Indian tribe is *Confederated Tribes of the Colville Reservation as the representative of the Joseph Band of Nez Perce Tribe, et al.* v. *United States*, 25 Ind. Cl. Comm. 99. The Commission has dismissed that portion of the claim relating to the internment for failure to state a cause of action (*ibid.*). The case is now pending before the Commission on other issues and will probably be controlled by the outcome in this case insofar as the internment issue is concerned.

Nor is there any reason to believe that this case represents a change in the Court of Claims' interpretation of the "fair and honorable dealings" clause. To the contrary, the Court of Claims has consistently indicated, both before and after its decision in this case, that the application of the "fair and honorable dealings" clause is tailored to the particular facts of each case. See, *e.g.*, *United States* v. *Oneida Nation*, 477 F.2d 939; *Cayuga Nation* v. *United States*, Ct. Cl. Appeal No. 16-72, decided June 29, 1973, not yet reported; *Aleut Community of St. Paul Island, et al.* v. *United States*, Ct. Cl. Appeal Nos. 11-72 and 12-72, decided June 20, 1973, slip op., pp. 10-17; *Gila River Pima-Maricopa Indian Community, et al.* v. *United States*, 199 Ct. Cl. 586, 591-592; *Lipan Apache Tribe, et al.* v. *United States*, 180 Ct. Cl. 487, 499-502.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1974.

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